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No. 1385

IN THE

# Supreme Court of the United States

October Term 1968

J. C. LONG and ALBERTA S. LONG, PETITIONERS

versus

BRUNSWICK CORPORATION, a corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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**Section 41-165**

**Section 41-205**

**Section 57-308**

**Section 60-101**

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BRUNSWICK CORPORATION, a corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. C. Long and Alberta S. Long, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINION BELOW

The opinion of the United States District Court for the District of South Carolina entered and filed by the Court on December 7, 1966 and a further Order entered and filed February 27, 1967 and not officially reported. (Appendix A, infra pp. 1a, 13a). The opinion of the United States Court of Appeals for the Fourth Circuit was filed February 2, 1968 and is not officially reported. (Appendix A, infra p. 21a).

## JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 2, 1968. An Order refusing to extend the time for rehearing was filed March 27, 1968. (Appendix A, p. 32a). The jurisdiction of the Court is invoked under 28 U. S. Code 1254(1).

## QUESTIONS PRESENTED

### I.

Whether *Erie R. Co. vs. Tompkins*, 304 U.S. 64, requires the United States Courts in a diversity case tried under the Laws of South Carolina to uphold the priority of a landlord, under a written and recorded lease, with respect to chattels placed on his premises, a lien on which is subsequently asserted under a tardily recorded chattel mortgage?

### II.

Whether *Erie R. Co. vs. Tompkins*, 304 U.S. 64, requires the United States Courts in a diversity case, wherein the owner of a chattel mortgage initiates the suit under a procedure peculiar to the statutory law of South Carolina, to limit the owner of the chattel mortgage to the relief provided by the statutory procedure.

### III.

Whether *Erie R. Co. vs. Tompkins*, 304 U.S. 64, requires the United States Courts to award Landlord judgment on the counterclaim for damages actual and punitive against the owner of a chattel mortgage which trespassed on Landlord's priority by seizing chattels on the premises when the owner of the chattel mortgage knew that the landlord had priority?

## STATUTES INVOLVED

The following statutory provisions are set out in Appendix B, infra: Sections 10-2501, 10-2504, 10-2516, 41-4, 41-165, 41-205, 57-308, and 60-101, Code of Laws of South Carolina for 1962.

## STATEMENT

Jurisdiction of this suit was founded on diversity and amount in controversy. This is a statutory proceeding known as "Claim and Delivery" under South Carolina statutes Sections 10-2501 through 10-2516, Code of Laws of South Carolina for 1962.

Brunswick Corporation commenced this suit against Floyd Corporation to repossess certain bowling lanes and equipment which were on the premises which Floyd occupied under lease from Petitioners J. C. Long and Alberta S. Long, landlords. The landlords were not made a party to the suit but intervened as soon as they became aware of it. Floyd Corporation defaulted and is no longer party to these proceedings.

Floyd Corporation had on February 22, 1962, with the knowledge of Brunswick and in the mutual interests of itself and Brunswick (TR 83, 84, 89, 90 and 94) entered into a ten (10) year lease at a guaranteed rental of One Hundred Twenty-eight Thousand Five Hundred Fifty-seven and 20/100 ($128,557.20) Dollars with The Beach Co. whereby The Beach Co. was to construct on its premises a building to contain the very lanes and pinsetters which are the principal object of this controversy. (TR 84 and 85).

These lanes and pinsetters were at that time in Floyd's possession in the Charleston area (TR 87) and Floyd contracted with Brunswick for Brunswick to perform the installation of this equipment in the new building (TR 66). The plans and specifications for this building (Intervenors' Exhibits A

& B) which were prepared by Floyd's architect (TR 84) provided that Floyd would install this equipment not the landlord, The Beach Co. Floyd never told Beach Co. that Brunswick had a lien on this property (TR. 21 and 22).

This building is virtually a single purpose building (TR 156) and cost over Ninety Thousand ($90,000.00) Dollars to build (TR 177).

J. C. Long and Alberta S. Long purchased the premises from The Beach Co. and are the landlords in this case.

The lease was recorded in short form on March 3, 1962 in the proper public office in Charleston County, South Carolina, and the short form was conceded by counsel for Brunswick to be evidence of the long form (TR 22 & 23).

The significant portions of the lease are the following:

> "TERM: Ten (10) years with Tenant's option for five (5) years.
>
> RENTAL PAYABLE MONTHLY: Ten (10) percent gross receipts with guaranteed minimum.
>
> ••••••
>
> "4. RENTAL.
>
> A. Floyd agrees to pay The Beach Co. for the original ten year term of this lease, a guaranteed minimum rental of $128,557.20 payable in advance in one hundred twenty (120) equal monthly installments of $1,071.31 on or before the 10th day of each month and every month during the ten year term hereof and the additional five year term if exercised by the tenant and at the same rate • • •
>
> "10. FLOYD'S PROPERTY.
>
> A. All equipment and trade fixtures placed in or on the said premises by Floyd shall remain the property of Floyd, which shall have the right to remove the same

within ten (10) days after the termination of this lease provided Floyd be not in default hereunder, and provided further, that Floyd shall repair, or reimburse Beach Co. for the cost of repairing any damage resulting to the demised premises from the removal of such trade equipment or trade fixtures." (Plaintiff's Exhibit 1)

The landlord intervened and contested Brunswick's seizure of the chattels on the ground that the landlord had a prior right under his written and recorded lease to have the chattels act as security for the performance of the lease, that he had complied with Sections 41-4 and 60-101 Code of Laws of South Carolina for 1962 which thereby gave the landlord's lease priority and that the tenant was barred under Section 57-308 from asserting any claim insofar as it affects the landlord in that parol and unrecorded reservations in personal property are void with respect to purchasers for a valuable consideration without notice. The landlord relied on the case of *Leggett & Co. vs. Orangeburg Piggly Wiggly Co.*, 176 S.C. 449, 180 S.E. 483 (1935) which gave priority to the landlord for the full term of his lease over the holder of a chattel mortgage where the landlord has made a timely recording of the lease and the chattel mortgagee has failed to record.

Landlord further asserts that Brunswick's conduct was a trespass on the rights of the landlord and that the manner in which it was performed was such as to entitle the landlord to actual and punitive damages in that without notice to the landlord Brunswick had seized the chattels on which Brunswick knew the landlord had a prior claim.

Brunswick asserted Section 41-205 Code of Laws of South Carolina for 1962, referred to as the Statute of Anne, as justification for its right to the chattels stating that this section limits the landlord's rights to the payment of only so much

rent that was due for the current month at the time of the taking and past due rent.

The bowling alleys known as "Pleasant Lanes" opened an September 15, 1962. More than one (1) month later, over six (6) months after the lease had been recorded October 24, 1962, Floyd Corporation executed a conditional sales contract with Brunswick Corporation on the lanes and pinsetters. This contract was not recorded until almost three (3) months afterwards on January 21, 1963. Just about eleven (11) months had passed since the recording of the lease.

Certain other miscellaneous equipment was also sold by Brunswick to Floyd by a conditional sales contract dated August 17, 1962 and recorded August 20, 1962. Brunswick offered no evidence that the execution and recording of this contract occurred before the chattels were placed on the premises.

More than a year after the lease had been recorded Brunswick had requested the landlord to subordinate the lease to the chattel mortgages. Landlord had refused. (TR 97, 98 and 175).

When Brunswick Corporation brought claim and delivery to repossess the lanes, pinsetters and miscellaneous equipment there was a balance of rent due of One Hundred Thousand Four Hundred Twenty-seven and 57/100 ($100,427.57) Dollars remaining on the balance of the ten (10) year lease. Brunswick did not join the landlord in the suit or contact the landlord in any manner.

The United States District Court has recognized the priority of the landlord's recorded lease but predicated this priority on the Statute of Anne, Section 41-205 Code of Laws of South Carolina for 1962. The Court in effect overruled *Leggett*

*& Co. vs. Orangeburg Piggly-Wiggly Co.*, 176 S.C. 449, 180 S.E. 482 (1935) and placed landlord in no better position than he would have occupied had he not even had a written lease much less a written and recorded lease. The Court also held that Brunswick had a right to repossess despite landlord's priority upon paying landlord One Thousand Four Hundred Eighty-six and 41/100 ($1,486.41) Dollars, less two months' rent, and that landlord had no cross action because Brunswick was doing what it could lawfully do.

At the hearing before the United States District Court on January 5, 1967 landlords contended that Brunswick having entered up a money judgment for its claim against Floyd Corporation it thereby waived its claim to possession of the chattels but the Court overruled this contention. (Hearing of Motion Jan. 2, 1967, P. 2)

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the landlords urged the Court of Appeals to recognize their priority under the recording statutes, to enforce the lease according to its terms, to hold that Brunswick had waived its claim to possession by entering a money judgment against Floyd Corporation, and to award landlords judgment on the counterclaim.

The Circuit Court in affirming the District Court, did not follow the *Piggly-Wiggly* case and the recording statutes of the State of South Carolina. It has not followed the decisions of the South Carolina Courts interpreting the statutory remedy of Claim and Delivery Sections 10-2501, 10-2503, 10-2504, and 10-2516, Code of Laws of South Carolina for 1962, the latest of which *Washington v. Western Auto Supply Co.*, 230 S.C. 424, 96 S.E. 2d 63 (1957) held that entry of a money judgment for the value of the property waived any right to the possession thereof.

The Courts have granted landlords a limited priority under the Statute of Anne. Landlords assert they are entitled to greater protection under the recording statutes and that when Brunswick, without notice to landlords, attempted by Court action to take possession of chattels to which landlords had priority, Brunswick thereby committed a trespass upon the rights of landlords and became liable in damages actual and punitive to landlords.

The Circuit Court of Appeals for the Fourth Circuit dismissed the counterclaim.

From these rulings which are in derogation of *Erie R. Co. v. Thompkins,* 307 U.S. 64, the petitioners seek relief by Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Fourth Circuit violates the principles of *Erie R. Co. vs. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L Ed 1188.

The decision of the United States Circuit Court of Appeals for the Fourth Circuit is squarely in conflict with the decision of the Supreme Court of South Carolina in *Leggett & Co. vs. Orangeburg Piggly-Wiggly,* 176 S.C. 449, 180 S.E. 483 (1935); ignores Sections 41-4, 57-308 and 60-101 Code of Laws of South Carolina 1962 the pertinent recording statutes; misconstrues the plain language of the lease; and permits Brunswick to seize property prior to a determination of the suit under a South Carolina procedure "Claim and Delivery", Section 10-2501, et sequitur Code of Laws of South Carolina for 1962, secure a money judgment against Floyd Corporation, contrary to the South Carolina law and retain the chattels when South Carolina decisions plainly provide that the entry of a money judgment in "Claim and Delivery" waives the right to possession of the chattels.

## I.

### Piggly-Wiggly

The relevant facts of the *Piggly-Wiggly* case are these. Landlord leased a store to tenant for a five (5) year term at a stated rental for the term to be paid monthly. On the same day the lease was executed tenant bought some fixtures. The lease was recorded on December 31, 1929. The fixtures were moved onto the premises in February 1930 but the chattel mortgage on the fixtures was not recorded until March 18, 1930. On December 24, 1932 tenant went into receivership. At that time tenant owed Five Hundred Twenty ($520.00) Dollars for 1932 and at least two more years rent. One thousand seventy-four and 60/100 ($1,074.60) Dollars was owed on the chattel mortgage.

The Statement of Facts by the Court:

> "Mrs. Freeland • • • • leased her storeroom • • • • for a period of five years at a stated rental to be paid monthly." @ 484.

The case was heard by a special referee who ruled in favor of the chattel mortgagee that the chattel mortgage had priority after the date it was recorded, March 18, 1930, over all rents thereafter accruing.

The circuit judge overruled the referee and held that since the lease was for a five (5) year term under a written contract, all of the rent was due on the date the lease was executed and since the lease was recorded before the fixtures were brought onto the premises, the lien of the landlord for rent had priority.

The South Carolina Supreme Court affirmed the Circuit Judge. Justice Bonham, who wrote the opinion, said:

> "The views of the writer of this opinion have always been in accord with those expressed by the special referee herein, but as was said by Mr. Chief Justice Blease, in which this writer concurred, it is essential that this vexed question be definitely settled. Since, therefore, the majority of the court held in acordance with the views of the circuit judge, the appeal must be dismissed and the judgment affirmed." @ p. 485.

On petition for Rehearing, the appellant asserted that under the written lease Piggly-Wiggly, the tenant had a legal right to remove the fixtures.

The Court said:

> "The lease gives the lessee the right to remove the fixtures, but it will not be contended that he could exercise that right while owing rent, still unpaid. @ 485.

In the case at bar we have a written lease at a stated sum a ten year term payable monthly. It is in evidence, it is uncontradicted, it speaks for itself. (Plaintiff's Exhibit 1)

This lease in Paragraph 10 (Statement page 3), gives the tenant the right to remove his property at the end of the term provided he has paid all rent and he restores the premises in the event of damage due to removal.

The essentials of the Floyd lease and the *Piggly-Wiggly* lease are virtually the same. The law should be the same.

It is important to note that the Piggly-Wiggly decision came at the end of a series of decisions involving contests between the landlord and the chattel mortgagee. The cases start with *Simpson vs. McDonald*, 72 S.C. 277, 60 S.E. 675 (1908) and end with *Piggly-Wiggly*. *Simpson vs. McDonald* was the law until 1930 when it was overruled by *Fidelity Trust & Mortgage*

*Co. vs. Davis*, 158 S.C. 400, 155 S.E. 622 (1930). The last was a bad decision and the very next time the question came before the South Carolina Supreme Court it reversed itself. *United States Hoffman Machinery Corporation vs. Harris*, 167 S.C. 443, 166 S.E. 613 (1932). The *Harris* case was followed by *Mather-James Co., Inc. vs. Wilson*, 127 S.C. 387, 174 S.E. 265 (1934) and in 1935 by *Piggly-Wiggly*.

*Piggly-Wiggly appears* to have put the law at rest to have definitely settled this vexing question because there have been no reported cases on this question of priority since 1935.

The Supreme Court of South Carolina based its decision on these words:

> "And just here may be mentioned a condition which has a material bearing on the question. If the rental contract be for a certain amount, say $600 for a year, then the entire amount must be considered as due at the beginning of the contract, although the payments may be made on a monthly basis of $50 per month. While, on the other hand, if the rental contract be by the month, the recorded mortgage ranks ahead of the monthly rent which is not due." @ 485.

It is significant that Landlords in the instant case based their rights on the recording statutes.

Aside from the recording statutes, and without a written lease, landlord would be entitled to the rights which the Circuit Court of Appeals has recognized under the Statute of Anne. These landlords are not asserting any rights to distraint. They assert their right to priority under their written and properly recorded lease. They ask for specific performance of the lease in its terms. Under that lease as under any contract, landlord has many rights, one of which is to distrain, if landlord

desires, as each monthly installment of rent comes due, or he may wait until many months have accumulated. This right exists even without a written lease, on a month to month contract. *Frady vs. Smith*, 247 S.C. 353, 147 S.E.2d 412 (1966).

*Gentry vs. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63 (1940) has been cited as overruling *Piggly-Wiggly sub silentio*. We submit that *Gentry* is authority solely in those cases where the lease was not recorded and was not entitled to priority under the recording statutes. In the *Gentry* case the landlord had not recorded the lease, the chattel mortgage had been duly recorded and landlord tried to distrain on the chattels. Distraint was the only remedy available to the landlord.

The court speaks of rent for the unexpired term as "unearned or future rent" and absolved the chattel mortgagee of liability therefrom because he had no notice from the recording of the lease and was a bona fide purchaser for value.

We submit that the result of the *Gentry* case was absolutely correct but it did not revive the *Fidelity Trust* case, supra, except with reference to the remedy of distraint, which is not in issue in our case.

The court said:

> "Certainly, such a limitation upon the rather extraordinary remedy of distress cannot be deemed unjust or unreasonable." @ 67.

J. C. Long and Alberta S. Long are not seeking to distrain. They ask the court to enforce Paragraph 10 of the lease to require Brunswick to leave the chattels on the premises.

Our landlords have complied with Section 41-4 Code of Laws of South Carolina for 1962 which requires a lease to be recorded in order for it to be notice to third parties. They

have also complied with Section 60-101 which renders invalid as to third parties without notice all leases for periods in excess of twelve months unless recorded and then only from the time of recording.

Further, under Section 57-308 an unrecorded reservation in personal property is void as to subsequent creditors whether lien creditors or contract creditors. Brunswick did not record its chattel mortgage before placing the chattels on the premises and as to the landlord the chattel mortgage is void. A landlord is a subsequent creditor within the meaning of this statute. *U. S. Hoffman Machinery Co. vs. Harris*, supra.

The construction which the Courts below have placed on this lease has the effect of rendered it worthless. Landlord would be just as well protected under a month to month tenancy.

We submit that under the recording statutes and *Piggly-Wiggly* the landlords, J. C. Long and Alberta S. Long are entitled to have the lanes and pinsetters remain in the premises.

## II.

## CLAIM AND DELIVERY

This is a statutory procedure for regaining possession of personal property. Without following this procedure Brunswick would have had no way to attach the chattels at the inception of the suit. Brunswick would have had to wait until the suit was terminated successfully in its favor in order to secure possession of the chattels by court order.

We have contended that Brunswick had no right to employ this remedy so long as landlord was entitled to priority, and, further, even if Brunswick were entitled to possession of the

chattels Brunswick waived the right, under South Carolina law, by taking a money judgment against Floyd.

Section 10-2516 Code of Laws of South Carolina for 1962 provides the specific relief and the only relief available under Claim and Delivery, namely: Judgment must be rendered in the alternative for possession or if possession cannot be had for the value of the chattels together with damages, actual and punitive, for the detention of the chattels.

Brunswick entered a money judgment against Floyd Corporation on October 20, 1966. At a hearing on January 5, 1967, landlord requested the Court to rule that thereby Brunswick had vaived any right to possession of the chattels which it may have had. The Court did not follow this contention and on appeal the Circuit Court held that both forms of relief were available to Brunswick.

We submit that this is contrary to the rulings of the Supreme Court of South Carolina.

In *Robbins vs. Slattery*, 30 S.C. 328, 9 S.E. 510 (1889) a judgment in a claim and delivery action which provided for a money judgment only was held erroneous. However, previously, in *Richey & Milen vs. Dupre*, 20 S.C. 6 (1883), where the chattel was not available for return, the award of a money judgment was approved.

In *Duc vs. Seel*, 134 S.C. 10, 131 S.E. 778 (1926) the Court held that where Plaintiff had been successful in the suit in Claim and Delivery but the jury had rendered a money judgment without providing for return of the chattel in the alternative, and Plaintiff had tried to collect the money judgment, Plaintiff thereby waived his right to return of the chattel.

In the more recent case *Washington vs. Western Auto Supply Co.*, 230 S.C. 424, 96 S.E. 2d 63 (1957) Washington had pur-

chased some furniture from Western. Western posted a bond and brought Claim and Delivery for the furniture, claiming a default in a chattel mortgage. Washington answered the suit and the jury awarded her judgment for possession of the furniture or Four Hundred ($400.00) Dollars. Washington entered up the judgment Western appealed and lost the appeal.

Subsequently Washington brought a suit against Western for the wrongful taking and withholding of her property. Western demurred on the ground of res adjudicata.

Our Court held that when Washington entered up the money judgment in the previous suit she thereby waived any right to possession of the furniture. The demurrer was sustained.

When the holder of a chattel mortgage takes a money judgment he waives his claim on the property. He elects to look to the debtor and not to the property for recovery.

Under South Carolina procedure the holder of a chattel mortgage may bring Claim and Delivery on default, take possession of the chattels before trial by posting bond, and if successful secure possession of the chattels then sell the chattels and if not sufficient to satisfy the debt, bring suit for any balance.

Or, the holder of a chattel mortgage may bring a foreclosure suit in equity but in such a suit the holder could not attach the chattels until after the Court tried the case and decreed foreclosure whereupon the Court would sell the chattels and apply the proceeds as it determined by its decree.

The instant case appears novel under South Carolina practice in that Brunswick appears to be following both procedures at once. Nevertheless having secured a money judgment which has been duly entered, Brunswick has waived any

further claim on the chattels and landlord is entitled to retain possession thereof.

## III.

## THE COUNTERCLAIM

The United States Court for the District of South Carolina and the Circuit Court of Appeals for the Fourth Circuit have recognized that landlords have priority, yet the courts have refused to vindicate landlords' rights by giving judgment on the counterclaim.

The Statue of Anne, Section 41-205 Code of Laws of South Carolina 1962, which Brunswick has raised as a defense, requires that no chattels be taken by any pretense unless the moving party shall before removal of the goods, pay the landlord all sums due for rent, up to one year's rent in arrears.

Brunswick never offered to pay one cent of rent prior to seizing the chattels and did not join the landlord in the suit. This in itself is a trespass upon landlord' rights and for this alone landlord is entitled to actual and punitive damages. *Graham vs. Seignous*, 53 S.C. 132, 31 S.E. 51 (1898), *Bigham vs. Harvy*, 91 S.C. 121, 74 S.E. 369 (1912).

Punitive damages are a matter of right under South Carolina law. *Sample vs. Gulf Refining Co.*, 183 S.C. 421, 191 S.E. 215 (1937); *Kurshner vs. Leggette*, 330 F.2d 447 (1964) 4th Circuit.

## IV.

The questions presented are of great importance to every landlord in the State of South Carolina in that a settled rule established finally in *Leggett & Co. v. Piggly-Wiggly*, supra, has been upset and the old conflict will be resumed. There

is no way to estimate the number of leases that are effected but it is certain that the number is very large because in the normal day to day business operations tenants are continually purchasing chattels on time and bringing them upon the landlord's premises. There is no way to know how many long term leases, extending over many years, now in operation are affected by this decision but it seems reasonable to believe that the number is considerable. Under the principle of *Erie R. Co. v. Thompkins*, supra, this court should affirm the holdings of *Leggett & Co. v. Piggly-Wiggly*, supra, and re-establish the law in this area.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with direction to dismiss the complaint and to enter judgment granting appropriate relief to petitioner on the counterclaim.

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